

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF: [REDACTED])

[REDACTED] and wife,)
)
)

Petitioners,)

VS.)

Metropolitan Nashville-)
Davidson County School System,)

Respondent.)

NO. 98-04

MEMORANDUM OPINION AND FINAL ORDER

JOHN W. CLEVELAND
ADMINISTRATIVE LAW JUDGE
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April 6, 1998

INTRODUCTION TO MEMORANDUM OPINION AND ORDER

CASE No. 98-04

This due process hearing was convened on February 27, 1998, before John W. Cleveland, Administrative Law Judge for the Tennessee Department of Education, sitting at Nashville, Tennessee, pursuant to and in accordance with Part B of the Individuals with Disabilities Education Act ("IDEA"), (P.L. 94-142; 20 U.S.C. § 1400 *et seq.*) and related federal regulations (34 C.F.R. § 300.1 *et seq.*); Tennessee Code Annotated, § 49-10-101 *et seq.*, as implemented by State Board of Education *Rules, Regulations, and Minimum Standards*, Chapter 0510-1-3-.09 *et seq.* (effective April, 1987)("TN.BD.ED. Rules"); and the Tennessee Administrative Procedures Act, T.C.A. § 4-5-301, *et seq.*

This Memorandum Opinion and the Final Order are based upon the Hearing Request dated January 29, 1998, the testimony of witnesses, the Student's education records and other exhibits offered by the parties. The School System's Post-Hearing Brief was received on March 12, 1998, and the Petitioner's Response was received on March 25, 1998.

From the proof adduced at the hearing, arguments of counsel and the record as a whole, the Administrative Law Judge makes the findings of fact and reaches the conclusions of law which follow in the Memorandum Opinion and Final Order.

The Student is referred to herein as "Student". The Student's parents are referred to as such or as the "Petitioners". The Student and his parents reside in Davidson County, Tennessee, where the Student attends school. The Metropolitan Nashville-Davidson County School System is referred to herein by name, as the "Respondent", the "School System" or as the "LEA".

MEMORANDUM OPINION
CASE NO. 98-04

INTRODUCTION

The due process hearing was requested by the Student's parents, who want the Student decertified and enrolled in a regular education program. At the due process hearing, the Student was represented by his parents, who did not have the assistance of counsel. The Student's brother and sister also participated in the hearing. English is a second language for the Student and his siblings. The Student's parents speak only Kurdish. Ismael Rozh interpreted for the family.

FINDINGS OF FACT

I.

THE STUDENT'S HISTORY

The Student was born in the middle east on January 1, 1984. The Student's family immigrated to the United States about 1991. He has been enrolled in the School System since 1992. For the first three years of his education in the School System, the Student was enrolled in the ENGLISH AS A SECOND LANGUAGE program ("ESL"), and he did not receive special education and/or related services. The Student is now fourteen years old and enrolled in the seventh grade in the School System.

On May 31, 1994, the Student was referred for a psychological evaluation due to poor academic performance. On June 3, 1994, the Student's father consented to the evaluation. On October 5, 1994, the psychologist completed her psychological evaluation of the Student based on a review of his cumulative folder, classroom observation, interviews with the Student, his family, and his teachers and formal psychological testing. A Kurdish interpreter was present during the formal psychological testing, and limited English proficiency was ruled out as a factor in making the eligibility determination. The psychologist diagnosed the Student as educably mentally retarded ("EMR").

Based on the psychological evaluation, an Assessment Team ruled out environmental, cultural, and economic disadvantages as the primary cause of the Student's handicapping condition and found that the Student was a handicapped individual who could not benefit from regular education without special education and/or related service. On October 10, 1994, an M-team determined that the Student was eligible for special education services under federal, state and local law. At that time, The Student's father agreed with the eligibility determination.

On October 5, 1994, an Individualized Education Plan ("IEP") was developed for the Student. He was to participate in the regular education program 14½ hours per week, and in special education 18 hours per week in a resource classroom. The Student's father signed the IEP.

On December 7, 1995, a second IEP was developed for the Student. He was to participate in the regular education program 21½ hours per week, and in special education 11 hours per week in a resource classroom/inclusion laboratory. The Student's father also signed this IEP.

On August 26, 1996, a third IEP was developed for the Student. He was to participate in the regular education program 20 hours per week and in special education 15 hours per week in a comprehensive development classroom. The Student's father signed this IEP.

From 1994 through the 1996-97 school year, the Student continued to participate in the ESL Program and made academic progress, but he continued to need special education to achieve his academic goals.

On May 20, 1997, the staff of the ESL Program, in which the Student had participated, recommended that the Student's participation continue during the next school year. The Student's father disagreed with the staff's recommendation and refused to allow the Student to continue in the ESL Program. Because the Student would not continue in a bilingual program, he was assigned to his school of zone for the 1997-98 school year.

On August 26, 1997, two IEP's were developed for the Student. The first IEP placed the Student in regular education for Library, Music/Art, lunch, Physical Education, and Vocational Education, and in a special education resource classroom for all academic instruction. The Student's parents did not agree with this IEP, but all other members of the multi-disciplinary team ("M-Team") approved the IEP. In light of the parents' refusal to approve the first IEP, a second IEP was developed. The second IEP placed the Student in regular education full-time with no modifications. The Student's father approved this IEP, and even though all other M-Team members disagreed, the second IEP was implemented.

Since August 26, 1997, the Student has been participating in the regular education program in the seventh grade. The Student has made no academic progress since August 26, 1997.

On January 22, 1998, an M-Team meeting was convened, and in light of the Student's lack of progress, a new IEP was developed. The IEP placed the Student in regular education twenty (20) hours per week, and in special education fifteen (15) hours per week in a resource classroom. The Student's father disagreed with this IEP, but all other members of the M-Team approved the IEP. At that time, the Student's parents refused to allow the school system to re-evaluate the Student, even though there has been no psychological evaluation of the Student since the initial evaluation over three years ago.

The Student's parents filed their request for this due process hearing to determine whether the Student is a child in need of special education and/or related services. Because the request was filed prior to the implementation of the January 22, 1998 IEP, the Student has continued in the regular, seventh-grade education program in the School System.

CONCLUSIONS OF LAW

Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act¹ ("IDEA") was enacted in 1975 to "assure that all handicapped children have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs."² Tennessee law also requires local school systems to provide children with "special education services sufficient to meet the needs and maximize the capabilities of handicapped children."³

IDEA does not require specific educational services for particular children or disabilities. Congress' relied on procedural compliance with IDEA to make substantive educational benefits available to handicapped children. IDEA requires that local school districts locate, identify, and evaluate children in need of special education, and to provide these children with a free and appropriate public education ("FAPE"). In 1994, the School System identified the Student as a child in need of special education, who cannot benefit from a regular education program without the provision of special education.

Initial Assessment or Evaluation

34 C.F.R. §300.7(a)(1), promulgated in accordance with 20 U.S.C. §1401(a)(1) of IDEA, provides as follows:

CHILDREN WITH DISABILITIES.

(a)(1) As used in this part, the term "children with disabilities" means those children evaluated ... as having ... disabilities, and who because of those impairments need special education and related services. [Emphasis added.]

¹ 20 U.S.C. §1400 *et seq.*

² 20 U.S.C. §1400(c).

³ T.C.A. § 49-10-101(a)(1).

TN.BD.ED. Rules 0520-1-3-.09 Rules (4)(a)(4) requires reevaluation of special education students' educational needs at least every three years.

COMPREHENSIVE EVALUATION

- (4) In order to determine that a child who is the subject of an individual assessment is an eligible child, the M-Team must conclude that because of the child's physical and/or mental impairments the child is in need of special education and related services and cannot be educated appropriately within the regular school program without the provision of such services." [Emphasis added.]

The Student was certified eligible for special education services in 1994. In 1997, he was returned to a regular education curriculum in regular education classes. He has acquired no educational benefit from this program. However, there has been no reevaluation of the Student's educational needs since 1994, or current M-Team assessment whether he could be educated appropriately within the regular school program with a high school curriculum specifically designed to meet his educational needs without the provision of such services.

Reevaluation

34 C.F.R. §300.534, promulgated in accordance with 20 U.S.C. §1412(5)(c) of IDEA, provides as follows:

REEVALUATION

Each SEA [State Education Agency] and LEA [Local Education Agency] shall ensure —

* * *

- (b) That an evaluation of the child, based on procedures that meet the requirements of §300.532, is conducted every three years, or more frequently if conditions warrant, or if the child's parent or teacher requests an evaluation. [Emphasis added.]

TN.BD.ED. Rules 0520-1-3-.09(4)(f) requires reevaluation of special education students' educational needs at least every three years.

REVIEW AND REVISION OF IEP

(4)(f) Each school system shall ensure that an individual assessment of each eligible child is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests, in writing, such an individual assessment. [Emphasis added.]

This Student has not been evaluated since October 5, 1994. The Student's parents have no specific objection to a re-evaluation. The Student's parents objection is not so specific. Their complaint is much more general; they do not want the Student certified and served as a special education student at all. Unfortunately, the Student's parents have no evaluations — or reevaluations — to demonstrate that the Student is no longer needs special education services. A reevaluation of this Student's educational needs is not only required by law, it is necessary before an informed determination whether the Student needs special education can be made by the Student's parents or the School System, acting through the multi-disciplinary team.

Because there is no reevaluation in evidence, this due process hearing cannot result in a determination whether the Student without a reevaluation. The process for reevaluation and development of an appropriate education plan for Student through the M-team involves the Student's parents and at least one teacher or other specialist with knowledge in the area of suspected disability.⁴ For this reason and others, the M-team meeting is a far superior forum than a due process hearing for determining the Student's educational needs.

⁴ 34 C.F.R. §300.532(e).

The Parents' Concerns

The Student's parents have expressed their concern that the Student was ignored in regular education classes because he felt strange and did not know how to behave, not having been in school before, leading his teachers to think he was disabled. The Student's father is concerned that he did not understand the forms he signed when he approved the initial evaluation and IEPs. The forms were explained to him by one of the Student's teachers who speaks Kurdish. The initial evaluation in 1994 was necessary to address both the School System's concerns and those expressed by the Student's parents.

The Student's parents are concerned that any educational benefit their son may gain from special education services will be offset by psychological suffering that they believe will be inflicted on their son by his being labeled "disabled," with the implication that he is totally mentally disabled and crazy. The Student's parents believe their son will refuse to attend school at all if he is in special education classes. This concern is so strong that the Student's parents are willing to accept their son's failure to pass a regular education course of study.

These concerns are not unusual for parents whose children have disabilities. Virtually all students are required to attend school until they are eighteen years old,⁸ and parents are generally subject to criminal penalties if their children are not in school.⁹ While the student is required to attend school, and the parents are required to send the student to school, neither the school nor the parents can insure that the student will learn from the experience. The decision whether any particular student should be educated in a regular education classroom or receive special education services does not belong to the school system or the parents. The child is neither the parents' property nor the school's prisoner. Our society has devised the mechanism by which this decision is made, and that mechanism has been codified as IDEA. Cooperation between the Student's parents and the School System within the M-Team meeting mandated following a reevaluation may produce a plan to provide the Student with an appropriate education without undue discomfort or offense.

⁸ T.C.A. §49-6-2-3001(c)(1).

⁹ T.C.A. §49-6-3009.

Transition Planning

It appears from the evidence presented at the due process hearing that the time is ripe to design a plan, within an outcome-oriented process, to provide transition services, including instruction, community experiences, the development of employment and other post-school adult living objectives and acquisition of daily living skills and functional vocational training, to promote movement from school to post-school activities.¹⁰ Through the reevaluation and M-Team meeting(s), the School System may be able to advance the Student to an age-appropriate high school level at a school with an ESL program, where resource, life skills, and/or a Moderate Intervention Program would be available with vocational programs such as drafting, auto mechanics, keyboarding, commercial arts, commercial food service, electronics, graphic art, microcomputer information systems, family and consumer science education, horticulture, commercial photography, cosmetology, music careers, office technology, and food management careers or careers working with children. Such a placement may be appropriate whether or not special education services are required for the Student to reap an educational benefit from his school experience.

Of course, whether the Student is provided special education services or not, the M-team may require participation in regular education classrooms. This Student still has several dynamic years of school ahead of him. His plans, educational and otherwise, will change many time, in ways both great and small, before he leaves school.


The School System has all the resources needed to meet the Student's needs. If the School System makes those resources available to the Student in an environment that challenges his abilities without demeaning his personal integrity, then the Student may become engaged in learning and achieve his potential, perhaps eventually without special education services.

¹⁰ 34 C.F.R. §300.18.

The Student's parents have his social, psychological and emotional well-being at heart. If the Student's parents will accept and actively participate in the IDEA-mandated process, and encourage the Student to earnestly apply himself to learn the lessons offered him with self-discipline to disregard any labels that may be applied to his education plan, then the Student may succeed without offense to his self-respect. This Student may avoid a lost fate only by seizing every educational opportunity provided him by the School System and squeezing every lesson he can learn from his experience at school.

CONCLUSION

The School System should ensure that the Student's educational needs are reevaluated as soon as possible. The evaluation will only assess whether the Student is a child in need of special education. When the Student's M-Team meets to consider the reevaluation, the School System members of the M-Team, the Student's parents and the Student should consider all of the resources at the School System's disposal, to determine whether the Student can benefit from a regular education program which includes the types of classes, programs and resources mentioned hereinabove, without the provision of special education services, whether or not the Student is a child in need of special education.¹¹



JOHN W. CLEVELAND
Administrative Law Judge

¹¹ See, 34 C.F.R. §300.7(a)(1); and TN.BD.ED. Rules 0520-1-3-.09 Rules (4)(a)(4).

FINAL ORDER

CASE NO. 98-04

In accordance with the findings of fact and conclusions of law set forth in the foregoing Memorandum Opinion, ***IT IS HEREBY ORDERED*** that:

1. The School System shall reevaluate the Student's educational needs as soon as possible.
2. As soon as possible after completion of the Student's reevaluation, the Student's M-Team shall convene to determine whether the Student is in need of special education and related services because of physical and/or mental impairments and cannot be educated appropriately within the regular school program without the provision of such services.
3. In determining whether the Student can be educated appropriately within the regular school program, the M-Team shall consider whether the Student can benefit from a regular education program designed, within an outcome-oriented process, to provide transition services, including but not necessarily limited to, instruction, community experiences, the development of employment and other post-school adult living objectives and acquisition of daily living skills and functional vocational training, to promote movement from school to post-school activities, at age-appropriate high school level in a school with an ESL program, where resource, life skills, and/or a Moderate Intervention Program would be available with vocational programs such as drafting, auto mechanics, keyboarding, commercial arts, commercial food service, electronics, graphic art, microcomputer information systems, family and consumer science education, horticulture, commercial photography, cosmetology, music careers, office technology, and food management careers and/or careers working with children, provided to the Student with all of the resources at the School System's disposal, without the provision of special education services.
4. The School District shall conduct the Student's M-Team meetings with open and forthright communication with the Student's parent about any and all specific proposals the School District may have for the Student's educational placement including discussion of the particular courses of instruction,

community experiences, employment and other post-school adult living objectives, acquisition of daily living skills and functional vocational training to be provided, the grade level at which the Student will be placed, and the named location where the School District proposes to implement the Student's IEP in compliance with 20 U.S.C. §1414(a)(1)(C)(iii) and 34 C.F.R. §§300.343 and 300.345.

8. Within thirty (30) days from the date of this order, the School System shall render in writing to the Tennessee Department of Education Regional Team Leader and the State Right-to-Education Office, a statement of compliance with this order.

ORDERED this 6th day of April, 1998.



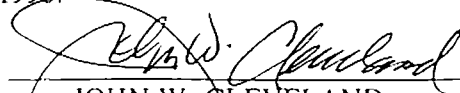
JOHN W. CLEVELAND
Administrative Law Judge

NOTICE

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court under provisions of Tennessee Code Annotated § 49-10-601. Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or may seek review in the United States District Court for the District in which the School System is located. Such appeal or review must be sought within sixty (60) days of the date of entry of a Final Order in non-reimbursement cases or three (3) years in cases involving educational costs and expenses. In appropriate cases the reviewing Court may order that this Final Order be stayed.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum Opinion and Final Order was served upon all adverse parties at interest in this case or their counsel or representative of record by telephonic facsimile transmission to the offices of said counsel or representative and/or by placing a true copy of same in the United States Mail, addressed to said parties or their counsel or representative at their offices, with sufficient postage thereon to carry the same to its destination, to-wit: [REDACTED] Nashville, Tennessee 37211; Rachel D. Allen, Metro Law Department, 204 Metropolitan Courthouse, Nashville, Tennessee 37201; and to Steve Raney, Staff Attorney, Dept. of Education, 5th Floor, Andrew Johnson Tower, 710 James Robertson Parkway, Nashville, TN 37243-0380, on April 6, 1998.



JOHN W. CLEVELAND
ADMINISTRATIVE LAW JUDGE